

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED WALKER,

Defendant.

Case No.: 2:03-cr-516-GMN-PAL

ORDER

Pending before the Court is Defendant Fred Walker's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. (ECF No. 144). The Government filed a Response (ECF No. 146), and Defendant filed a Reply (ECF No. 147).

I. BACKGROUND

The federal grand jury returned a superseding indictment on March 30, 2004, charging Defendant with the following counts: (1) possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii); (2) carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A); and (3) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). (ECF No. 26). On April 15, 2004, a jury convicted Defendant of all counts in the superseding indictment. (ECF No. 42). At sentencing on November 2, 2004, Defendant was sentenced to life imprisonment for count one, five years consecutive for count two, and ten years concurrent for count three. (ECF Nos. 60, 64). Defendant received a life sentence for count one based on an Information filed by the Government indicating three prior felony drug convictions in Los Angeles County. (ECF No. 21); 21 U.S.C. § 841(b)(1)(B)(iii) ("If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment

1 without release”). On June 12, 2006, the Ninth Circuit affirmed Defendant’s conviction and
 2 sentence on direct appeal. (ECF Nos. 84, 85); *United States v. Walker*, 182 F. App’x 655 (9th
 3 Cir. 2006).

4 On September 13, 2006, Defendant timely filed his first Motion to Vacate under 28
 5 U.S.C. § 2255, arguing ineffective assistance of counsel. (ECF No. 88). The Court denied this
 6 motion on December 29, 2006. (ECF No. 97). Defendant filed several further motions which
 7 the Court construed as Second or Successive Motions under 28 U.S.C. § 2255 and subsequently
 8 denied. (*See* ECF No. 108). Defendant also unsuccessfully pursued a sentencing reduction
 9 under Amendment 750 to the United States Sentencing Guidelines. (*See* ECF No. 135).

10 On January 14, 2015, the Superior Court of California, County of Los Angeles, entered a
 11 Minute Order reducing one of Defendant’s drug felonies to a misdemeanor pursuant to
 12 California Penal Code § 1170.18.¹ (Mot. to Vacate 12–13, ECF No. 144).

13 **II. LEGAL STANDARD**

14 Under 28 U.S.C. § 2255, a Defendant may file a motion requesting the Court which
 15 imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). However,
 16 in order to file a “second or successive” § 2255 motion with the district court, a defendant must
 17 first obtain certification from the appropriate court of appeals. 28 U.S.C. § 2255(h).

18 “[T]he latter of two petitions is not ‘second or successive’ if there is a ‘new judgment
 19 intervening between the two habeas petitions.’” *Wentzell v. Neven*, 674 F.3d 1124, 1127 (9th
 20 Cir. 2012) (quoting *Magwood v. Patterson*, 130 S. Ct. 2788, 2802 (2010)).

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 25 ¹ Proposition 47, also known as the Safe Neighborhoods and Schools Act, which was enacted on November 4, 2014, and became effective the following day, created a new resentencing provision under which certain individuals may petition the Superior Court of California for a recall of sentence and request resentencing. *See* Cal. Penal Code § 1170.18.

1 **III. DISCUSSION**

2 Defendant argues that this Court has jurisdiction to review this § 2255 motion because it
3 is not a successive motion. He cites *Panetti v. Quarterman* and *Johnson v. United States* for
4 the proposition that “[a] later § 2255 motion raising a claim that could not have been raised via
5 the earlier motion does not present a successive motion.” (Mot. to Vacate 4, ECF No. 144).
6 However, these citations are misplaced. While *Panetti* does provide an instance where a
7 second-in-time petition was not considered a “successive” petition, the circumstances were
8 significantly different. *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007) (allowing a “Ford-
9 based incompetency claim[], [which] as a general matter, [would not be] ripe until after the
10 time has run to file a first federal habeas petition.”). Further, in *Johnson*, the issue was
11 timeliness, not successive petitions, as the defendant’s initial § 2255 petition was denied
12 without prejudice as untimely. *Johnson v. United States*, 544 U.S. 295, 299–301, 308 (2005).
13 The *Johnson* Court then found that the defendant’s vacated state court ruling reset the one-year
14 time limit so the defendant could proceed on his *first* § 2255 petition through § 2255(f) which
15 allows an extension of the limitations period. *Id.* Thus, the issue was not a successive petition,
16 but rather the timeliness of the first petition.

17 Here, neither *Panetti* nor *Johnson* apply to Defendant’s successive petition. Further,
18 unlike *Wentzell*, there is no new judgment in this case. While one of Defendant’s felony
19 convictions was reduced to a misdemeanor, Defendant received only a sentence reduction in his
20 state case, not a vacated state sentence.² There has been no new judgment between the time
21 Defendant filed his first § 2255 petition and now.

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23 ² The Court notes that Defendant’s sentence was enhanced based on “two or more prior convictions for a felony
24 drug offense” under 21 U.S.C. § 841(b)(1)(B). Defendant has only provided evidence of a sentence reduction for
25 one of his three felony drug offenses, meaning that there are two remaining prior felony drug convictions. To the
extent that Defendant provides an excerpt from his direct appeal arguing that a second of his felony drug
offenses was not a felony, (Mot. to Vacate 16–18, ECF No. 144), the Ninth Circuit already denied this argument
and affirmed Defendant’s conviction and sentence. *See United States v. Walker*, 182 F. App’x 655 (9th Cir.
2006).

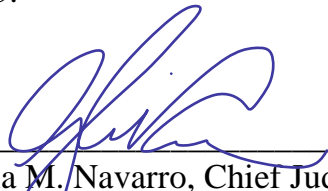
1 Defendant has already filed a § 2255 motion, which was denied on the merits. (ECF No.
2 97). Therefore, Defendant's current § 2255 is a successive petition, and § 2255(h) applies,
3 requiring a certification of appealability from the applicable court of appeals.

4 Accordingly, the Court must dismiss Defendant's motion for lack of jurisdiction because
5 Defendant has not yet obtained a certificate of appealability from the Ninth Circuit Court of
6 Appeals.

7 **IV. CONCLUSION**

8 **IT IS HEREBY ORDERED** that Defendant's Motion to Vacate under 28 U.S.C.
9 § 2255 (ECF No. 144) is **DENIED**.

10 **DATED** this 8 day of December, 2015.

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14 Gloria M. Navarro, Chief Judge
15 United States District Court
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